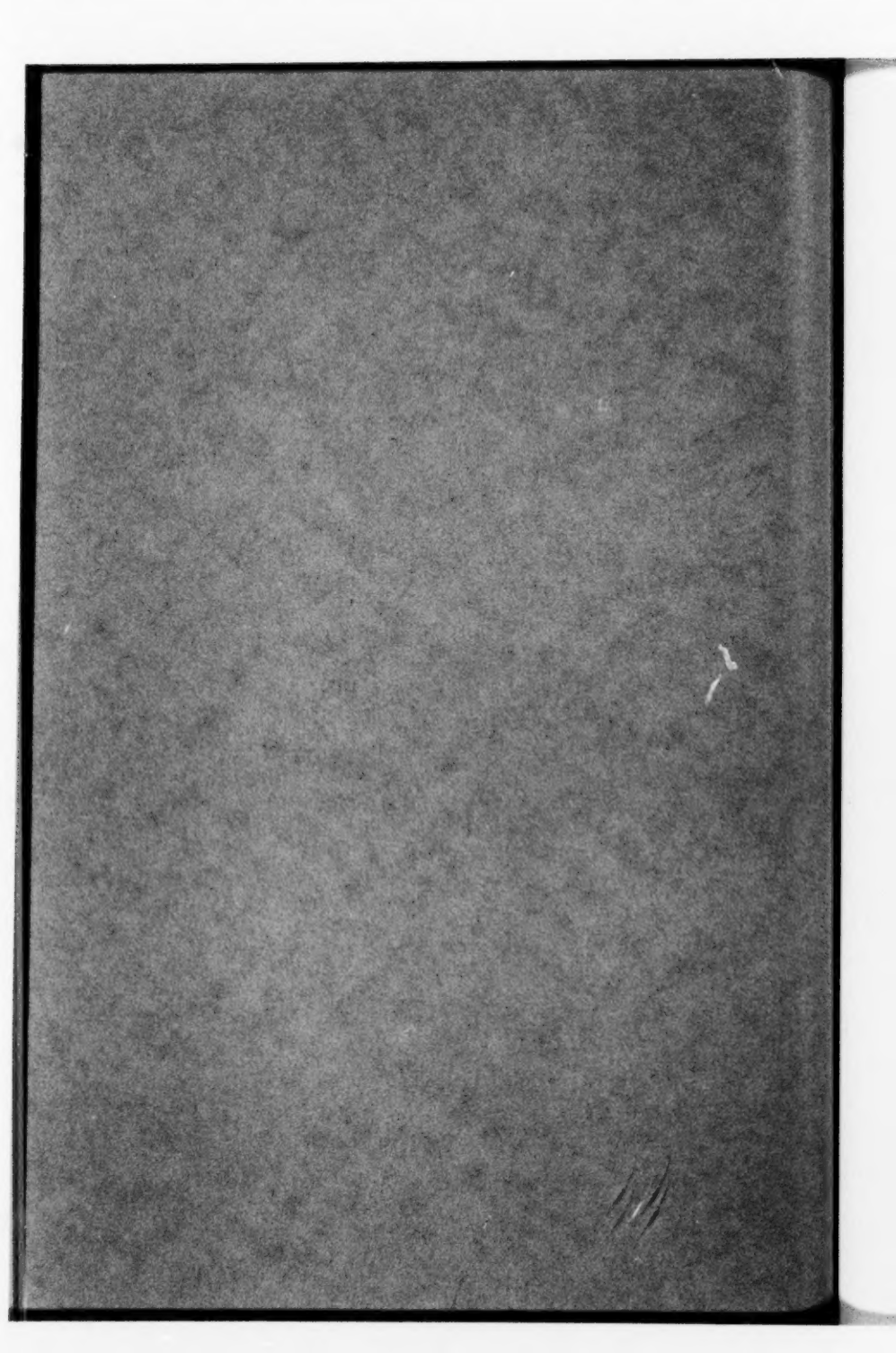

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No. 966

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

CHARLES BELAND,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Brief of Petitioner in Support of Petition for Writ of Certiorari

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

Opinion of Court Below

The opinion of the Circuit Court of Appeals for the Fifth Circuit herein was rendered on the 27th day of February, 1941, and is set forth in the record at Pages 1043-1047. (We do not understand that the same has as yet been officially reported.)

II.

Jurisdiction

(1) The judgment of the Circuit Court of Appeals for the Fifth Circuit, sought to be reviewed herein, insofar as the same is applicable to the conviction,

sentence, and judgment as to the 42nd count of the indictment, is dated and was entered on the 27th day of February, 1941 (R. 1048). Petition for rehearing was duly filed in said Circuit Court of Appeals on the 19th day of March, 1941, (R. 1049-1057), and the same denied by the Circuit Court of Appeals on the 20th day of March, 1941 (R. 1058).

(2) The statutory provisions which sustain the jurisdiction of this Court is Section 240 (a) of the Judicial Code, Sec. 347, Title 28 USCA.

(3) The cases and authorities which sustain said jurisdiction, among others, are as follows:

Boyd v. United States, 116 U. S. 616;
Russell v. Southard, 12 How. 139, 158, 159;
Warner v. New Orleans, 167 U. S. 467;
Patton v. United States, 281 U. S. 276;
United States v. Gulf Refining Co., 268 U. S. 542;
United States v. Young, 232 U. S. 155.

(4) The decision of the Fifth Circuit Court of Appeals affirming the judgment of the trial court as to the 42nd count of the indictment, and holding that petitioner did have legal representation as to the filing of the affidavit of personal bias and prejudice, and the filing of the motion in support thereof, and that the evidence sustained a conviction on the 42nd count of the indictment, was a decision inharmonious and dissonant with the record of the proceedings summarily had as to the affidavit filed by petitioner and his motion in support thereof and with the record of

the trial, contrary to the weight of authorities, contrary to the Due Process Clause of the Fifth Amendment to the Constitution of the United States, contrary to the Sixth Amendment to the Constitution of the United States and applicable decisions of this Court, and in conflict with decisions of other Circuit Courts of Appeals for other circuits, and such a departure from the accepted and usual course of judicial proceedings, both in the court below and on appeal, and such an erroneous action and decision in conflict with the weight of authorities, the laws of the United States, and in conflict with applicable decisions of this Court, as to bring the case within the jurisdictional provisions relied upon herein.

III.

Statement of the Case

The statement of the case has already been summarized and set forth in the preceding petition under I, "*Summary Statement of Matters Involved,*" which, for the sake of brevity, is hereby adopted and made a part of this Brief, excepting, however, the inclusion in this Brief, fully set forth in the appendix, of that part of the record below, to-wit, the affidavit of personal bias and prejudice, the motion filed in support thereof, and the record of the summary proceedings had on June 28th, 1940, the latter dealing with the trial court's action on the hereinbefore mentioned affidavit and motion in support thereof; these latter inclusions within this Brief in the appendix being

deemed advisable so that this Court may have before it for reference purposes this pertinent and unusual record of what occurred in the trial court prior to and on June 28th, 1940.

Petitioner respectfully shows that on June 20th, 1940, pursuant to the provisions of the statute, Sec. 394, Title 28, USCA, and Sec. 25, Title 28, USCA, the prepared and seasonably presented for filing, and did file on that date with the Clerk of the court an affidavit of personal bias or prejudice directed against the trial Judge, the Hon. T. Whitfield Davidson. Sec. 394, Title 28 USCA, provides:

> "In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said court, respectively, are permitted to manage and conduct causes therein."

Section 25, Title 28 USCA, provides:

> "Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in section 24 of this title, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court,

or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action. (March 3, 1911, c. 231, §21, 36 Stat. 1090.)"

The record shows (R. 1036) that subsequent to petitioner filing with the Clerk of the court the said affidavit of personal bias or prejudice, the Clerk notified petitioner that the affidavit had not been recorded as filed; the Clerk certifying that his action was predicated *upon the order of the United States Attorney* to the Clerk, "beca ıse the affidavit was not certified to by a lawyer," notwithstanding the fact that no lawyer of record was on file for petitioner, and petitioner had duly signed, and certified to the affidavit as counsel acting in his own proper person.

It is to be noted herein, that on the date of petitioner's filing the said affidavit, the date set for trial was eleven days hence, namely, July 1st, 1940, and that petitioner had complied with the statute governing the filing of such affidavits within the ten days period set out therein under the statute. Upon the notification to petitioner by the Clerk of the court concerning the refusal by the Clerk to file the said affidavit, petitioner prepared a motion in support thereof

the filing of the said affidavit, for presentation to the trial Court on the date set for arraignment, namely, June 28th, 1940, signing the same as "Attorney in his own behalf."

Thereafter, petitioner succeeded in engaging counsel to represent him contingent on the action of the trial Court on June 28th, 1940, as to the affidavit of personal bias and prejudice and the motion in support thereof, to present and argue the customary and usual dilatory motions, namely, motions to dismiss, to strike, and to sever.

Petitioner respectfully shows that on June 28th, 1940, before being arraigned on the several indictments docketed against him, the matter of the affidavit of personal bias and prejudice and the motion in support thereof came on to be heard. The record shows that the trial court immediately subjected petitioner to examination not as to the sufficiency of the affidavit of personal bias and prejudice, and the validity of the said motion in support thereof, but as to the filing of same by petitioner acting in his own behalf, and judicially attempted (with the aid of counsel for the United States) to controvert the affidavit by *direct and indirect attack*, and at one and the same time both denied the petitioner the *right to file the said affidavit and motion in support thereof* while acting as his own counsel, as being *improperly filed;* yet judicially recognized petitioner as counsel for himself, and recognized Counsellor Smith as not being counsel for the petitioner in that summary proceeding, as the record abundantly shows herein. (R. 1038-1041.)

Quoting from the record, the attention of the Court is called to the following portion thereof had before the trial court in the summary hearing of June 28, 1940, wherein the petitioner was called to testify by the court as to the truth and sufficiency of his affidavit of personal bias or prejudice on the part of the trial judge, the trial judge not being satisfied to test the legal sufficiency of said affidavit but by implication compelling petitioner to take the witness stand in his own case as a defendant in a criminal case, and in which proceeding the following appears from the record; (See Appendix):

> "The witness, CHARLES BELAND, having been first duly sworn, testified as follows:
>
> THE COURT: I think perhaps you ought to have a guardian to save yourself from walking deliberately into making a false swearing in court.
>
> A. Well, your Honor, I will solemnly swear that every one of these words of this affidavit to be the truth, as far as I know and believe."

Petitioner further shows to this Court that following the action of the trial Judge on June 28th, 1940, that the cause came on for trial on July 8th, 1940, and on July 18th, 1940, petitioner was found guilty of Counts 16, 18, and 42 of the indictment. Petitioner thereupon duly filed a motion in arrest of judgment, on July 18th, 1940, and same being overruled, the trial Court sentenced petitioner to serve a period of five years generally on Counts 16 and 42 of the indictment, and ten years imprisonment on Count 18, the latter sentence being ordered suspended.

In its decision of February 27th, 1941, the Fifth Circuit Court of Appeals reversed the conviction of petitioner on Counts 16 and 18, and affirmed the judgment of conviction and sentence on Count 42. This cause is limited to the judgment and conviction of petitioner as to the 42nd count of the indictment.

—o—

IV.

Specifications of Errors

(1) The Circuit Court of Appeals for the Fifth Circuit erred in holding that the trial court properly denied petitioner the right to file the said affidavit of personal bias or prejudice directed against the trial Judge.

(2) The Circuit Court of Appeals for the Fifth Circuit erred in holding that the trial court properly tested the legal sufficiency of the affidavit of personal bias or prejudice.

(3) The Circuit Court of Appeals for the Fifth Circuit erred in holding that petitioner was represented by two counsel of record and was not acting as counsel in his own behalf.

(4) The Circuit Court of Appeals for the Fifth Circuit erred in holding there was sufficient evidence to support a verdict of guilty as to the 42nd count of the indictment.

(5) The Circuit Court of Appeals for the Fifth Circuit erred in not reversing the judgment of con-

viction because of the inflammatory and prejudicial remarks made by the United States Attorney in his summation to the jury, and for the failure of the trial court to declare a mistrial when timely and properly objected to by petitioner.

(6) The Circuit Court of Appeals for the Fifth Circuit erred in affirming the judgment and sentence of the trial court as to the 42nd count of the indictment.

(7) The Circuit Court of Appeals for the Fifth Circuit erred for other errors appearing in the record.

V.

Point A

(Specification of Errors Nos. 1, 2, and 3.)

The Circuit Court of Appeals for the Fifth Circuit erred in holding that the trial court properly denied petitioner the right to file said affidavit of personal bias or prejudice directed against the trial judge, and the motion in support thereof, and that the trial court properly tested the legal sufficiency of the affidavit, and that it was insufficient in law, and that petitioner was represented by *two counsel* of record, and that petitioner was not properly before the trial court as counsel in his own behalf.

QUESTION PRESENTED

The question presented here for determination is whether a defendant in a criminal action has the right and privilege under the Fifth and Sixth Amendments to the Constitution of the United States, to plead and manage his own cause, where he is without legal representation, availing himself of statutory benefits under Sec. 25, Title 28 USCA.

Petitioner respectfully submits that the decision of the Fifth Circuit Court of Appeals was erroneously bottomed, and that the record does not support the holdings of the said Circuit Court. The record shows that petitioner did *seasonably and timely* file the said affidavit of personal bias or prejudice; that petitioner availed himself of the right to act in his own behalf because he was without legal representation; that he was without counsel, and did act as his own counsel on June 28th, 1940, when he appeared before the trial Court to urge his motion in support of the affidavit filed by him on June 20th, 1940; and that his rights and privileges under the Due Process Clause of the Fifth Amendment to the Constitution of the United States were violated by the trial Court in that he was denied procedural due process.

In connection with the right to plead and manage one's own cause, as provided by Sec. 394, Title 28 USCA, *supra*, it was held in *Bocz v. Hudson Motor Co.*, 19 Fed. Supp. 385:

> "Everyone has a right to appear in his own proper person and represent himself."

As the record shows, petitioner timely and seasonably filed the affidavit of personal bias and prejudice, only to be subsequently informed by a ministerial officer of the Court, to-wit, the Clerk of the Court, that the same was not recorded as filed on order of the United States Attorney (R. 1036). Petitioner submits that he was entitled to have his affidavit passed upon by a court of competent jurisdiction, and not by a ministerial officer of the Court.

Covering the duty of a Court in such matters, and the practice in connection with the filing of such papers, it is well to note the opinions of Courts of Appeals in the following cases: *Saunders v. Piggly Wiggly Corp.*, 1 Fed. (2d) 582; *American Brake Shoe Foundry Co. v. Interborough Rapid Transit*, 6 Fed. Supp. 215. In the Saunders case, *supra*, the Court held: "It is the duty of the district judge to test whether the motion is legally sufficient. * * *" In the American Brake Shoe case, *supra*, the Court held: "Practice is to permit the filing of affidavit for purpose of considering its timeliness and legal sufficiency, and then to order it stricken from record if insufficient, or to certify to withdrawal of judge if sufficient in law."

Petitioner submits that the trial Court was the only port of authority permitted by statute (and the applicable decisions thereon) to deal with the legal sufficiency of the affidavit. Certainly not a Clerk of the Court. Despite the attempt by the Clerk and the United States Attorney to circumvent petitioner's rights in filing the affidavit, the matter came on for

hearing, but the record shows said hearing was held in an arbitrary manner. Notwithstanding the views held by the Circuit Courts of Appeals, and this Court, covering the procedure in such matters, the trial Court summarily refused and denied petitioner the right of filing his affidavit without testing the legal sufficiency of the same.

Petitioner earnestly contends that *the nub of legality in any cause is that form of procedure which in no wise infringes on the rights of the parties.* This was the heart of this Court's decision in a recent case known as *Edwards v. United States*, 61 S. Ct. 673, wherein Justice Reed, speaking for the Court said: "Procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body."

The record abundantly shows that on June 28th, 1940, when petitioner appeared before the trial Court to urge his motion in support of the affidavit of personal bias and prejudice, that what occurred then could not, by any form of reasoning, be held to have been procedural due process affecting petitioner's cause. Petitioner found himself attacked, discredited, threatened with future criminal prosecution, his good faith impugned, harassed not only by the Court, but too, from counsel for the United States acting in open Court.

Nowhere in the proceedings of June 28th, 1940 is there found an attempt by the Court to pass upon and lawfully test the legal sufficiency of petitioner's affidavit of personal bias or prejudice.

On the contrary, petitioner's rights were challenged, trampled upon, ignored, all because he sought to exercise his Constitutional prerogative as counsel acting in his own behalf because circumstances were so contrived as to compel him to seek lawful relief based on honest beliefs and facts held by him, by his own advocacy.

Petitioner showed by his affidavit that he was a party to the series of actions then docketed against him, viz, four indictments; petitioner had filed the affidavit eleven days before the date set for trial, namely, July 1st, 1940; the trial had not commenced; delay of the trial was not involved, for the trial was postponed by the Court of its own motion from July 1st, 1940 to July 8th, 1940.

Wherein can it be held that petitioner was derelict in complying with the laws governing such matters? Acting as his own counsel, petitioner contends he had the right to certify that the affidavit was made in good faith. Was he then not entitled to have the said affidavit lawfully considered, as has been held so many times by various Courts of Appeals and this Honorable Court? What was said in *Morris v. United States*, 17 Fed. (2d) 831, and reiterated by the Court in *Henry v. Speer*, 201 Fed. 869, and in the Saunders case, *supra*, certainly applied to the instant case. In the Morris case, *supra*, the Court held:

> "It is not within the province of the trial judge to pass upon the good faith of the defendant making an affidavit of prejudice under this section."

As to the question of petitioner's good faith in filing the affidavit, what was said in *Flegenheimer v. United States*, 110 Fed. (2d) 379, deserves mention here. In that case, counsel's good faith was challenged. Petitioner had died. Counsel prosecuted an appeal to the Third Circuit to clear their names from aspersions made by the lower Court which were part of the record there. The Circuit Court held: "As long as the deceased (affiant in that proceeding) *honestly believed* that the judge was biased and stated on what facts he based his opinion, *it was his right to call on his counsel* to give the certificate provided by statute in order to have the question of bias determined." Altho the circumstances confronting petitioner in this case were of a slightly different character, petitioner did not have opportunity to *call upon his counsel to give the certificate*, because he had no counsel; and, being counsel in his own behalf, he gave a certificate in compliance with the provisions of the statute, as the record shows.

Wherein was there bad faith on the part of the petitioner?

Petitioner further respectfully shows that the record fully discloses he was not represented by counsel, or had counsel of record. Counsellor Smith, present in court on June 28th, 1940, stated to the Court he was not representing petitioner on the affidavit or the motion in support thereof; that he was to represent petitioner thereafter upon arraignment was implied in the colloquy that occurred during the hearing on petitioner's motion, in the event the Court adverse-

ly ruled on the motion for disqualification of the trial Judge. The record shows that the Court recognized Counsellor Smith's status, as revealed by the following; (See Appendix):

> "Mr. Smith: I would like the record to show that I am not representing Mr. Beland *on that motion.*"
>
> "The Court: *The Court understands Mr. Smith does not appear on this motion and will permit him to decline to appear.*"
>
> "Mr. Smith: May it please your Honor, in order to keep the record straight, Mr. Beland didn't tell me he wanted to testify. What he said was, to file some motion."
>
> "The Court: You might let it show that you do or do not appear for him."
>
> "Mr. Smith: *No, sir, I don't appear for him at all.*"

The record further shows the Court's ruling, and its contradictory import:

> "The Court: Mr. District Attorney. I will ask you to file, to dictate to the reporter some contest on this. I don't think it should be heard nor is entitled to be heard, *until some lawyer certifies to it and not having been certified to by any lawyer, and he having a lawyer who does not certify to it, the Court will dismiss the affidavit as the matter stands.*"

to which action of the Court the petitioner himself took timely objection, as revealed by the following:

"Mr. Beland: *Your Honor, can I take exception to the Court's ruling?*"

"The Court: You certainly may."

Thus, the record shows the Court accepted Counsellor Smith's statement *he was not petitioner's counsel on the motion*, and at one and the same time recognized petitioner's own representation of himself as counsel permitting him to act as counsel, challenging petitioner's certificate of good faith; in one ruling summarily disregarding and destroying petitioner's Constitutional rights and privileges.

Petitioner respectfully submits that the affidavit involved herein merited the judicial holding of legal sufficiency. Petitioner concedes that some Circuit Courts of Appeals have drawn fine lines of distinctions as to what constitutes the legal sufficiency of an affidavit of personal bias or prejudice, and the construction of the statute involved, Sec. 25, Title 28 USCA. Some Courts have held the statute must be strictly construed in order to protect against abuses of the same. Other Courts have liberally construed the statute. Certain decisions approved affidavits filed on mere information and belief, while other decisions showed such affidavits filed on information and belief rejected. In *Berger v. U. S.*, 255 U. S. 22, it was held that an affidavit may be filed on information and belief; and to the same effect held by the Courts in *Nations v. U. S.*, 14 Fed. (2d) 507, cert. den. 273 U. S. 735, 71 L. Ed. 866; and in *Chafin v. U. S.*, 5 Fed. (2d) 592, cert. den. 269 U. S. 550, 70 L. Ed. 407.

In the Nations case, *supra*, Judge Booth, writing

for the Court, held: "We do not think that the affidavit need be so drawn as to fulfill the technical requirements of an indictment." There the affidavit was made on mere information and belief, stating facts straightforwardly and honestly, although considerably vague in essence and content, yet the affidavit was upheld by the Court. In the Chafin case, *supra*, the facts were more substantially grounded, and the affidavit, though somewhat scandalous as to content, was upheld in a lucid and informative decision.

In the instant case, the circumstances moving petitioner to compose and file the affidavit were unusual, but substantially grounded, and not of a scandalous nature. His fears stated by him were tangible and real because he, and members of his family, feared the trial Judge and for good cause (see affidavit set out in appendix). Petitioner's fears had become aggravated with the passage of time, not lessened; his fears had never become dormant, and were not suddenly revived by him to be used as a subterfuge to avoid being tried by Judge Davidson. The record abundantly illustrates that everything petitioner feared about the trial Judge, and predicted by him that might befall him if tried by the trial Court against whom the petitioner directed his affidavit, *did befall him.*

The record shows Judge Davidson sentenced petitioner on two counts, 16 and 18, where no evidence was shown against petitioner, after overruling a motion in arrest of judgment which clearly pointed out to the Court the error of the jury's verdict as to these

two counts; these sentences imposed on the two counts in question being reversed by the Circuit Court. Rulings made throughout the trial by the Court, affecting petitioner, were made in favor of petitioner's opponent with constant regularity. The record speaks for itself far more forcefully than petitioner can here inscribe.

We contend that petitioner predicated his affidavit of personal bias or prejudice upon tenable and substantial premises, and that the trial Court, prejudiced against the petitioner, and in favor of the petitioner's opponent, denied petitioner a fair and impartial trial as guaranteed him by the Constitution of the United States and the amendments thereto.

Petitioner earnestly submits that the Fifth Circuit Court of Appeals did not carefully examine, and did not carefully analyze the affidavit of personal bias or prejudice filed by him, and did not give analytical consideration to the background of the said affidavit which it merited. For, had the Circuit Court done so, the inescapable conclusion would have been that the affidavit was legally sufficient; and with the record of the summary hearing of June 28th, 1940, before it, together with the record of the proceedings of the trial, conviction, and sentence, to hold that petitioner's fears were not properly grounded as stated by him in his affidavit, and that the affidavit was insufficient, was to render a decision disregarding the record, and bottoming its opinion upon grounds not in the record.

Point B

(Specification of Errors Nos. 4, 5, and 6.)

The Circuit Court of Appeals for the Fifth Circuit erred in holding there was sufficient evidence to support a verdict of guilty as to the 42nd count of the indictment, and in not reversing the judgment of conviction for the failure of the trial court to declare a mistrial as was asked because of the inflammatory and prejudicial remarks made by the United States Attorney in his summation to the jury, and in affirming the judgment and sentence of the trial court as to the 42nd count of the indictment.

Petitioner respectfully directs the attention of this Honorable Court to that part of the Circuit Court's decision wherein the evidence adduced against petitioner was commented upon. The Court said: "The evidence shows without dispute that Beland was in close and constant contact with the other conspirators; his name appeared on the record books of the New York Syndicate; he sought out and gave his co-conspirators the names and addresses of prospective customers; he gave information as to who was presently in possession of heroin and where it could then be found; *he gave heroin to the Blakeleys* and informed them that his co-conspirator Ross had gone to their home to sell them heroin which had just been procured from New York. The existence of a conspiracy may be shown by *inference and circumstantial* evidence and any substantial knowledge and participation in a conspiracy will justify a verdict of guilty."

A careful examination of the record and the analysis in the record of the individual counts and the overt acts listed, shows that petitioner did not participate in the formation of the general conspiracy, alleged to have been formed in the summer of 1937. The overt acts pleaded shows that eighteen months after the formation of the conspiracy, petitioner allegedly entered the conspiracy (in 1939), allegedly acting in concert with the Blakeleys, touching only on the 40th and 41st counts of the indictment. These latter two counts directly charged petitioner with giving away, or dispensing, to the Blakeleys, a small quantity of heroin. The evidence shows further that petitioner did not *conspire to give away*, or *to dispense*, the said heroin in question; and the record shows *that the jury acquitted petitioner of the commission of these two substantive charges, namely, the 40th and 41st counts of the indictment.*

Petitioner respectfully shows that the Circuit Court in its decision held that: "Beland's conviction on Counts 16 and 18 *is not supported by the evidence*, and no sentence should have been assessed on these counts." Thus, petitioner stood acquitted by the jury in Counts 1 to 15 inclusive, Count 17, and Counts 19 to 41 inclusive; and the Circuit Court's reversal of the conviction on Counts 16 and 18 found petitioner acquitted of all of the substantive charges, Counts 1 to 41 inclusive because the record and the evidence showed he was not a party to the commission of these substantive offenses; directly or indirectly as an aider or abettor, or principal; and lastly, *not even a party to the conspiracy to commit these offenses.*

There is some testimony in the record that petitioner talked with the Blakeleys concerning a visit one Ross made to the Blakeleys' home. However, such a conversation with the Blakeleys bore no relation to any of the substantive offenses set out in Counts 1 to 41 inclusive. The record further shows, that Ross, the main government witness and informer, and Ross' wife, exonerated petitioner from participation in a general conspiracy to commit the substantive offenses charged in Counts 1 to 39 inclusive, and that petitioner neither aided nor abetted the commission of these offenses.

Petitioner earnestly submits that the record as a whole shows that at most he was *inactively acquiescent* of the so-called general conspiracy; that he was included as a defendant by the pleader as a conspirator, dispenser of drugs to the Blakeleys, because the draughtsman drew an all-embracing *dragnet conspiracy charge*, naming individuals within, and without the district wherein the substantive offenses were charged to have been committed, merely because some of the principal actors in the general conspiracy, and some of the principal violators of the offenses charged, at some time or another came in contact with petitioner on occasions during said period of time laid in the indictment; and conversed about matters bearing no relation to the charges in the main, as herein discussed.

The Circuit Court in its decision held: "There was abundant evidence upon which the jury *could* have based conviction of Beland on *certain* substantive counts of the indictment." We respectfully contend

that this conclusion of the Circuit Court completely ignored the testimony and the record. Mere *inactive acquiesence*, acquaintance with some of the members of the general conspiracy, did not and does not prove petitioner guilty of conspiracy, and the record so supports petitioner's contentions as argued herein. We submit that in the instant case, "conspiracy, that darling of the modern prosecutor's nursery" (Judge Hand in *Harrison v. United States*, 7 Fed. (2d) 259), was used and abused by the pleader; that to conclude petitioner was guilty of conspiracy as charged in the 42nd count of the indictment, the Circuit Court pursued a strained and tortuous analysis of the record and the evidence.

Petitioner further respectfully shows that the Circuit Court in its decision disregarded the record showing the failure of the trial court to declare a mistrial as asked for, when the United States Attorney, in his summation to the jury, stated: "You talk about they have got him here under guard *** yes, he is under guard so some of you fellows won't kill him before he testifies," such statement being timely objected to by counsel as being highly inflammatory and prejudicial.

The trial Court ordered the remark stricken from the record, and instructed the jury to disregard the same. We earnestly contend that the ruling by the Court could not, and did not cure the harmful effect of the United States Attorney's remark on the minds of the jury. The record shows the United States Attorney did not withdraw the remark. The decision

of the Circuit Court shows it gave no consideration to this phase of the case, although argued in the brief below by petitioner, sufficiently explicit to inform the Circuit Court.

Petitioner respectfully submits that such inflammatory and prejudicial remarks can not be erased from the minds of the jury by mere order of the trial Court. The mind of the layman is a catch-all, sponge-like, highly receptive. Under the circumstances attendant that act of misconduct on the part of the United States Attorney, with the witness before the jury, starkly and startlingly voicing such remarks, is it reasonable to believe that the mere order of the trial Court to disregard the statement by the United States Attorney could possibly erase the harmful, prejudicial, and inflammatory effect so suddenly created? Jurors are human; they are but average laymen called upon to judge the facts, appraise evidence, analyze the demeanor of witnesses and defendants, to segregate in their minds highly technical propositions governing law, facts, and the reason of things generally; buffeted first one way, and then another, by counsel for the government, and by counsel for the defense. Their human predilections necessarily must come to the fore; jurors can not be held to possess extraordinary and exceptional evenness of temper; calm and dispassionate mental powers and processes of such an extraordinary nature as would remove them from the ken of ordinary human beings. It must be remembered that jurors, untrained in the ways of law and evidence can not be expected to have the same judicial bent of mind as those trained in the

law, and those experienced in its intricacies and involvements. To maintain the rule that the harmful effects of such inflammatory and prejudicial remarks are curable upon the order of the Court, is to continue in force a rule that is obsolete, irreconcilable with modern day logic and psychological analysis of things and men, and the mind. See *Holt v. United States*, 94 Fed. (2d) 90. (C.C.A. 10th.)

Such inflammatory and prejudicial references concerning defendants was held to be prejudicial error in *U. S. v. Sprengel*, 103 Fed. (2d) 876, and in *U. S. v. McNamara*, 91 Fed. (2d) 986; and in *Berger v. U. S.* 295 U. S. 78, 79 L. Ed. 314, the judgments of convictions and sentences in the aforementioned cases being ordered reversed because of the misconduct of the district attorneys in those cases.

Conclusion

We respectfully submit that the decision of the Circuit Court of Appeals for the Fifth Circuit was and is in conflict with the decisions of other Circuit Courts of Appeals, and this Honorable Court; that the same involves important questions of Federal Law and is an erroneous decision not in keeping with the record herein involved, in conflict with the weight of authority and the applicable decisions of this Court, and that the writ of certiorari prayed for herein should be granted.

Therefore, petitioner respectfully submits that for the reasons hereinbefore stated, this cause is one calling for the exercise by this Court of its supervisory

powers, by granting a writ of certiorari and thereafter reviewing and reversing the decision and judgment of the Circuit Court of Appeals for the Fifth Circuit.

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